Filed 6/18/19 P. v. Garcia CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN ANTONIO GARCIA,

Defendant and Appellant.

F076440

(Super. Ct. No. 4001298)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Dawna Reeves, Judge.

Maryam Nemazie for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Tia M. Coronado, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

On appeal, appellant contends his convictions must be reversed. Specifically, appellant contends the prosecutor committed misconduct in his rebuttal argument by (1) "sandbagging" the defense by referring to a graphic created from two photographs

admitted into evidence, and (2) telling the jurors that to convict appellant of assault with a firearm, they were not required to find the gun was loaded and that the perception of appellant's ability to apply force was sufficient. Appellant also contends the trial court erred by admitting People's exhibit 10, a photograph of a handgun found on appellant's cell phone; and by not staying appellant's sentence on count 2 pursuant to section 654. Finally, appellant contends the evidence was insufficient to support true findings on the enhancement allegations and his convictions for counts 1, 2, 3, 5, and 6. In supplemental briefing requested by this court, appellant also contends the matter should be remanded to allow the trial court to exercise its discretion whether to strike his firearm enhancements pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620). After review of appellant's contentions, we affirm.

PROCEDURAL BACKGROUND

A jury convicted appellant of first degree robbery (Pen. Code, § 212.5, subd. (a);[1] count 1); first degree burglary (§ 459; count 2); assault with a firearm (§ 245, subd. (a)(2); count 3); assault with a deadly weapon (§ 245, subd. (a)(1); count 4); making criminal threats (§ 422, subd. (a); counts 5 & 6); and giving false information to a police officer, a misdemeanor (§ 148.9, subd. (a); count 7). The jury found true that appellant personally used a firearm in the commission of counts 1, 2, 3, 5, and 6 (§§ 12022.53, subd. (b) [count 1], 12022.5, subd. (a) [counts 2, 3, 5, & 6]) and personally used a deadly weapon, to wit, a knife, in the commission of counts 1, 2, 5, and 6 (§ 12022, subd. (b)).

As to count 1, appellant was sentenced to the middle term of four years, plus 10 years for the firearm enhancement and one year for the deadly weapon enhancement, for a total of 15 years. As to count 2, appellant was sentenced to the middle term of four years, plus the aggravated term of 10 years for the firearm enhancement and one year for the deadly weapon enhancement, for a total of 15 years to run concurrent to count 1. As

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1 All further statutory references are to the Penal Code unless otherwise noted.

to count 7, appellant was sentenced to 180 days with no probation to run concurrent to count 1. The court stayed the sentences on counts 3 through 6 pursuant to section 654. Appellant's total sentence was a term of 15 years.

FACTUAL BACKGROUND

The victims in this case were appellant's former romantic partner, Cecilia M., and her then-current romantic partner, Jose M.[2] Appellant and Cecilia had broken up approximately five years before the incident. Cecilia and Jose testified to the following facts.

On October 14, 2016, at around 11:00 a.m., Cecilia and Jose were in Cecilia's apartment bedroom. They heard loud and "insistent" knocking at the front door that occurred for approximately five to seven minutes. They did not answer the door. Cecilia and Jose then heard appellant at the bedroom door. Cecilia went out to the living room to speak with appellant. Cecilia told appellant that Jose was in the apartment. Appellant went to Cecilia's apartment to tell her that her car, which was being repaired by his acquaintance, was ready. Appellant talked to Cecilia for about 10 minutes and then left the apartment. Cecilia locked the front door behind him. She then locked the sliding glass door to her patio, which was the only other entrance into the apartment. Cecilia went back to the bedroom and closed the door.

About an hour later, appellant swung the bedroom door open, with a gun in one hand and a knife in the other. Appellant pointed the knife at Cecilia and pointed the gun at Jose. He approached Cecilia and held the knife up to the center of her chest. Appellant stood approximately six or eight to 10 feet away from Jose while pointing the gun at Jose. At some point, appellant cocked the gun. Jose said the gun made a clicking sound when appellant cocked the gun.

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[2] We refer to the victims by their first names to respect their privacy. No disrespect is intended.

When asked to describe the gun appellant was using, Jose said all he knew about guns was the difference between an automatic pistol and a revolver, and the gun appellant was using was an automatic pistol, rather than a revolver. Jose said the gun depicted in People's exhibit 10 was an automatic pistol and was similar to the gun appellant used. Cecilia testified the gun was black. Neither victim knew much about guns. Neither victim knew if the gun was loaded, only that appellant cocked it. When asked on cross-examination if the gun could have been a BB gun, both witnesses said they did not know.

During the encounter, appellant said he should have killed Cecilia when she was 14 years old but did not because she was pregnant. Appellant told Jose to take off his pants because he was going to castrate him. Cecilia was nervous and in fear for Jose. Jose felt nervous and powerless to help Cecilia and was afraid that appellant would hurt Cecilia. Jose said at one point during the encounter he was not fearful and that he was just observing appellant. Later Jose said he was afraid appellant might hurt him.

At one point, appellant asked for and took both Cecilia's and Jose's cell phones and put them in his pocket. Jose testified this occurred after appellant had been there for eight or nine minutes and about five to 10 minutes before he left.

Appellant held the knife and gun to Cecilia and Jose for approximately 10 to 15 minutes. Then, Cecilia's oldest son came home, knocked on the bedroom door, and told appellant to leave. Appellant put the gun in his pants behind him and tucked his shirt over it and left. Cecilia's cell phone had fallen on the floor, but appellant took Jose's cell phone with him when he left. Jose's cell phone had a case on it, which contained his I.D. card and credit cards.

Cecilia had not seen any weapons on appellant the first time he went to the apartment that day. When appellant went into the bedroom, he said "I have been waiting for about an hour now. I have been listening to you talk." "I even already drank a beer." Appellant had taken a beer from Cecilia's refrigerator.

On October 15, 2016, Corporal Ashley Williams was investigating the assault and made contact with appellant. Williams asked appellant if he was "Juan," and appellant said no. Williams asked appellant for identification, and he provided her with a Mexican I.D. card with Jose's name on it. Williams arrested appellant for possessing a stolen identification card.

A search warrant was executed at appellant's home. Officer Jason Hutchins testified that one of the items found in appellant's home was a red cassette box with the words "Kingdom Recordings" and an image of a bearded gentleman printed in gold. The box opens like a book and is designed to hold two cassette tapes across and three cassette tapes down. It is designed to hold the cassette tapes laying flat. The top two and middle right spaces for cassette tapes had been taken out, leaving an "L-shaped" cutout in the box. Hutchins said that Jose's cell phone was found inside the cassette box.

Corporal Williams testified that People's exhibit 10 is a copy of a photograph found on appellant's cell phone. The photograph depicts what appears to be a black handgun with a brown grip and two empty ammunition magazines. The gun and the magazines are positioned on top of a cassette box with the words "Kingdom Recordings," that looks identical to the box found in appellant's home in which Jose's cell phone was found. Williams testified that the box appears to be longer than the handgun.

Cecilia's oldest son, Jaime, testified on behalf of the defense. Jaime testified that when he got home during the offense, he knocked on the bedroom door and told appellant to come out of the room. Appellant left. Jaime did not see appellant with any weapons in his hands when appellant came out of the room. Jaime noticed appellant's shirt was untucked and covered appellant's waist. Jaime did not see appellant take anything. The People recalled Jaime as a rebuttal witness, and Jaime testified he had seen appellant in possession of a handgun with "jewelry-like rubies" all over the gun at appellant's residence within a year before the incident.

DISCUSSION

I. Prosecutorial Misconduct

Appellant claims two incidents of prosecutorial misconduct: one involving a graphic displayed during the prosecutor's rebuttal to defense counsel's closing argument and one involving a comment regarding the crime of assault with a firearm, also made during the prosecutor's rebuttal. We find neither claim requires reversal.

A prosecutor's behavior constitutes a federal constitutional violation " 'when [it] comprises a pattern of conduct so egregious that it infects " 'the trial with unfairness as to make the resulting conviction a denial of due process.' " ' " (*People v. Hamilton* (2009) 45 Cal.4th 863, 920.) To determine whether there is prosecutorial misconduct under state law, " ' " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " ' " (*People v. Linton* (2013) 56 Cal.4th 1146, 1205.) Challenged statements to the jury must be reviewed "in the context of the argument as a whole." (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

A. The Graphic Displayed During the Prosecutor's Rebuttal

1. *Relevant Background*

People's exhibits 6 and 7 are photographs taken during the execution of the search warrant at appellant's home. People's exhibit 6 depicts the front cover of the Kingdom Recordings cassette box found in appellant's home. People's exhibit 7 depicts the Kingdom Recordings cassette box open laying flat with the L-shaped cutout in view and Jose's cell phone inside. People's exhibit 10 is the photograph found on appellant's cell phone. People's exhibit 10 depicts a handgun laying on top of a "Kingdom Recordings" cassette box seemingly identical to the one found in appellant's home depicted in People's exhibits 6 and 7.

During the prosecutor's rebuttal to defense counsel's closing argument, he argued appellant was in possession of a firearm during the commission of the crimes:

> "[PROSECUTOR]: Let's take for example the gun. Whether [appellant] had the gun in his possession. Again, we had testimony that the gun was black, from both Cecilia and Jose. We had testimony that the gun was an automatic firearm, not a revolver. So this is what he have to consider.
>
> "But we also have circumstantial evidence that [appellant] did indeed have this gun. On People's 10, this was a picture located on [appellant's] cell phone.
>
> "[DEFENSE COUNSEL]: Your Honor, I'm going to object. This is going beyond the scope of my closing.
>
> "THE COURT: Overruled.
>
> "[PROSECUTOR]: This is a picture located on [appellant's] cell phone, a picture of a black handgun. And we heard Jose say this is not a revolver. This People's 10, the gun in People's 10, is an automatic.
>
> "Well, that's consistent with their testimony about what [appellant] used. But there is something else, something more that really connects everything together, and that is what the gun is on, this Kingdom recording book. It's very unique, color, style everything.
>
> "And then we look at People's 6. This is the same Kingdom recording book that Jose's phone was found in in [appellant's] residence. Same name, same color, same everything.
>
> "So what's even more interesting is that cut out. You will see a little cut out here inside the Kingdom recording book. And that cut out is just perfect for the black semi-automatic handgun.
>
> "[DEFENSE COUNSEL]: Again I'm going to object. It's beyond the scope of my closing.
>
> "THE COURT: The objection is noted and overruled.
>
> "We can put the … Court's reasoning on the record after we are finished with the arguments."

During this portion of the prosecutor's rebuttal, he was displaying a PowerPoint slideshow. One of the slides depicted People's exhibit 7, the photograph depicting the open cassette book/box with the L-shaped cutout. The next slide was an image of only the gun from People's exhibit 10 floating down from the top of the screen right on top of the L-shaped cutout, illustrating his argument that the gun could fit inside the cutout.

Outside the presence of the jury, the court addressed defense counsel's objection to the prosecutor's comments as being outside the scope of defense counsel's closing. Defense counsel argued that the theory the gun could have fit in the cassette box should have been presented in the prosecutor's initial closing. The court stated it did not see the animation element and asked to view it. The prosecutor informed the court that the photograph of the gun, which was superimposed onto People's exhibit 7, came from People's exhibit 10. Upon viewing the objected to portion of the slideshow, the court explained its ruling to defense counsel's objection was only regarding the subject matter of the prosecutor's argument. The court stated it had not seen the slides displayed during the objection. The court then asked both counsel to address the prosecutor's manipulation of the exhibits. The prosecutor argued the evidence showed that the gun was not wider than the width of the cutout and it was relevant to the People's theory that the gun could fit in the box where appellant kept Jose's cell phone. Defense counsel argued that she thought the argument was more appropriate for initial closing and that she was entitled to address the theory. In response, the prosecutor stated that the theory was brought out through evidence because the prosecutor had asked Officer Hutchins whether the firearm would fit in the box.[3] The court stated:

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[3] When the prosecutor asked Hutchins to opine whether a firearm could fit in the box, defense counsel objected, and the court sustained the objection because the question called for speculation. The prosecutor asked Corporal Williams if the length of the box was longer than the handgun depicted in People's exhibit 10, and she opined that it was.

> "The objection was that it was beyond the scope. I believe my ruling stands. My only concern now is if the manipulation of the photograph in this fashion is inappropriate. And what my feeling is that the People—both sides, rather, are allowed to make reasonable inferences from the evidence, and it is the evidence. [¶] I don't think that it's inappropriate to argue that the gun could have fit in that space. So the question is, is it appropriate to use the evidence to demonstrate it in a visual fashion? [¶] I don't think so. I think my ruling stands. I didn't see it when it was being displayed. I understood [defense counsel's] objection to be the firearm and the box itself, how it was being argued. And I think that verbally you could do it, and I think what is being displayed here is visual argument, based on the evidence. [¶] So … my ruling is going to stand, it's overruled."

2. *Analysis*

Appellant argues the prosecutor's combining of People's exhibits 7 and 10 essentially created a new exhibit. Appellant argues displaying the manipulated image in his rebuttal amounted to "sandbagging" because the defense did not have the opportunity to comment on the theory that the gun could have fit into the cassette box. We do not agree that the subject matter of the prosecutor's rebuttal was improper or amounted to "sandbagging." We do agree that the prosecutor's manipulation of the photographs was improper and should not have been allowed; but, any error was harmless.

Prosecutors have "much latitude when making a closing argument." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1330.) Prosecutors may make vigorous arguments and fairly comment on the evidence; they have broad discretion to argue inferences and deductions from the evidence to the jury. (*People v. Sandoval* (2015) 62 Cal.4th 394, 450.) In particular, "[r]ebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel." (*People v. Bryden* (1998) 63 Cal.App.4th 159, 184.) Misconduct cannot be based on a prosecutor's remarks responsive to defense counsel's argument, as long as those remarks do not go beyond the record. (*People v. Hill* (1967) 66 Cal.2d 536, 562.)

Here, defense counsel argued in her closing argument that the evidence did not prove beyond a reasonable doubt that appellant used a gun in the commission of the

offenses. The prosecution had clearly always maintained that appellant used a firearm in the commission of the crimes, and the argument that appellant had been in possession of a gun like the one purported to be used in the commission of the crimes was in line with the prosecutor's theory of guilt. People's exhibit 10 was admitted at trial for the purpose of showing appellant had possession of a gun similar to that used during the crimes. The prosecutor's rebuttal argument simply built on this concept and did not go beyond the record or put forth a new theory of guilt.

Appellant's reliance on *People v. Carter* (1957) 48 Cal.2d 737 (*Carter*) is misplaced. *Carter* concerns the rebuttal stage of a trial wherein the prosecution presented new evidence "crucial" to the defendant's guilt. (*Id.* at p. 754.) *Carter* does not examine what is permissible in a rebuttal closing argument. Further, contrary to appellant's claim, no new evidence was presented in the prosecutor's argument, nor was the idea represented by the graphic "crucial" to appellant's guilt. Both Cecilia and Jose testified that appellant used a firearm in the commission of the offenses. The evidence the prosecutor discussed simply bolstered Cecilia's and Jose's testimony and the idea that appellant was in possession of a firearm similar to that used in the crimes. Appellant's trial counsel had the opportunity to argue and did argue the evidence the firearm depicted in People's exhibit 10 was the firearm used in the commission of the crimes was weak. The final determination as to the weight of the evidence is for the jury to make. (*People v. Brown* (2014) 59 Cal.4th 86, 106.) We agree with the trial court that the subject matter of the prosecutor's rebuttal was not improper because it was in response to defense counsel's argument the prosecutor had not met his burden of proving a firearm was used in the commission of the crimes and the comment was on evidence within the record. Thus, we do not believe it constituted new evidence or a new theory of guilt so as to constitute "sandbagging."

While we conclude the prosecutor was permitted to argue that the gun could fit inside the Kingdom Recordings box in his rebuttal argument, to visually manipulate

photographic evidence without laying proper foundation is improper. From our view of the prosecutor's PowerPoint slideshow, court exhibit 1, and our interpretation of the prosecutor's explanation of the graphic on the record, it appears the prosecutor used a computer program to do the following: "cut" the image of the firearm out of exhibit 10, invert the image of the firearm so that it faced the opposite direction from how it originally appeared in exhibit 10, and place it in an animated fashion onto the top of exhibit 6, so that it fit perfectly into the L-shaped cutout of the Kingdom Recordings cassette box. It cannot be ascertained what resizing or other editing was done to make the gun fit into the cutout. The danger of deception with this kind of manipulation is high.

However, we do not believe the error requires reversal. Based on this record, we cannot say that the prosecutor's use of court exhibit 1 rendered this trial fundamentally unfair. As such, any presumed misconduct did not rise to a due process violation. Because appellant's federal constitutional right to a fair trial was not violated, we apply the state standard for harmless error: whether it is reasonably probable that appellant would have obtained a more favorable result in the absence of the prosecutor's actions. (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) The jury could have easily concluded the gun could fit inside the cutout based on the exhibits in their original forms.

It is not reasonably probable the prosecutor's demonstration was a deciding factor as to whether appellant committed the charged crimes. It is not reasonably probable that appellant would have obtained a more favorable result in the absence of the prosecutor's disputed conduct. Accordingly, any error was not prejudicial, and this claim fails.

B. The Prosecutor's Statement Regarding Assault with a Firearm

1. *Relevant Background*

During the prosecutor's rebuttal to defense counsel's closing statement, the prosecutor stated the following in regard to the assault with a firearm charge:

"Remember the gun doesn't need to be loaded. Doesn't need to be in working order. It just has to have the perception of being able to be used in a forceful matter." Defense counsel objected that the prosecutor misstated the law. In response, the court told the jury, "Ladies and gentlemen, remember my instruction that what the attorneys say is not evidence. In their arguments they do discuss the case, but you are going to be the determiner at the end of the day of what the facts are, and you will receive … written instructions about the law. If the attorneys misstate the law, you are to follow the law as I provide it, and you will receive written copies of it."

The jury was orally instructed and provided in written form with CALCRIM No. 875, which reads:

> "The defendant is charged in Count 3 with assault with a firearm in violation of Penal Code section 245.
>
> "To prove that the defendant is guilty of this crime, the People must prove that:
>
> > "1. The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person;
> >
> > "2. The defendant did that act willfully;
> >
> > "3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;
>
> "AND
>
> > "4. When the defendant acted, he had the present ability to apply force with a firearm to a person.
>
> "Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.
>
> "The People are not required to prove that the defendant actually touched someone.

> "The People are not required to prove that the defendant actually intended to use force against someone when he acted.
>
> "No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault.
>
> "The term *firearm* is defined in another instruction to which you should refer."

"Firearm" was defined as "any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion" in the instruction for the firearm enhancement, CALCRIM No. 3146.

2. *Analysis*

Appellant argues that because an element of the crime of assault with a firearm is that the defendant must have the present ability to apply force with a firearm, the comment by the prosecutor that the firearm "doesn't need to be loaded" or "in working order" and "just has to have the perception of being able to be used in a forceful matter" is a misstatement of the law. We agree the prosecutor's statement was incorrect but conclude this misstatement does not require reversal.

" 'A long line of California decisions holds that an assault is not committed by a person's merely pointing an (unloaded) gun in a threatening [manner] at another person.' " (*People v. Penunuri* (2018) 5 Cal.5th 126, 147.) Present ability to apply force may be proven by circumstantial evidence (*ibid*.), as we discuss in our discussion of appellant's sufficiency of the evidence claim, but the prosecutor's comments were harmful in that they could lead the jury to conclude they could find appellant guilty of assault with a firearm even if they *expressly* found the gun was not loaded.

"It is misconduct for a prosecutor to misstate the law during argument. [Citation.] This is particularly so when misstatement attempts 'to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.' " (*People v. Otero*

(2012) 210 Cal.App.4th 865, 870–871.) The prosecutor's statements could be construed as absolving the prosecution from its obligation to prove beyond a reasonable doubt appellant had the present ability to apply force.

However, "[a] prosecutor's misstatements of law are generally curable by an admonition from the court." (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' " (*People v. Osband* (1996) 13 Cal.4th 622, 717.)

Because the court immediately admonished the jury to follow its instructions in light of any misstatements by the prosecutor, and the jury was properly instructed that it needed to find appellant had the present ability to apply force, we do not find reversal is required.

II. Admission of People's Exhibit 10: The Photograph of a Firearm Found on Appellant's Cell Phone

A. Relevant Background

Before trial, appellant's trial defense counsel objected to the admission of People's exhibit 10, the photograph found on appellant's cell phone of the handgun laying on top of the Kingdom Recordings cassette box. The objection was based on lack of notice and foundation. Defense counsel confirmed she had received the contents of the cell phone prior to trial. The court asked the prosecutor how he planned on laying foundation for the photograph. The prosecutor informed the court that he would call the law enforcement officer who found the photo on appellant's cell phone. The prosecutor made an offer of proof that the "Kingdom Recordings" cassette box depicted in the photograph had been located at appellant's home and Jose's cell phone was inside. The prosecutor said his

intent was "to use People's 10 to show circumstantial evidence that, (a), [appellant] has possession of a firearm; (b), it matches the description that Cecilia mentioned was a black firearm; and (c), … to establish … it was on the same Kingdom Recordings [cassette box] as where the cell phone was found, showing that the defendant had possession of it." Defense counsel argued there was a foundational issue particularly as to when the photo was taken. The court stated that when the photograph was taken was not required to lay a proper foundation and instead went to the weight of the evidence. The court overruled defense counsel's objection to the admission of People's exhibit 10.

At trial, Corporal Williams testified that upon appellant's arrest, another officer pat searched appellant and found a cell phone. The cell phone was booked into evidence. Williams testified she accessed the cell phone on the day of her testimony. The prosecutor showed her a copy of People's exhibit 10, and Williams testified it was a true and accurate depiction of a photo she had observed on appellant's cell phone. The prosecutor moved to admit People's exhibit 10 into evidence. Defense counsel objected on the ground of foundation, and the court overruled the objection and admitted the exhibit into evidence. On cross-examination, defense counsel asked Williams if she knew when the photo was taken and whether she knew who took the photograph; Williams answered no to both questions.

B. Analysis

On appeal, appellant argues proper foundation was not established for the admission of People's exhibit 10 and the court therefore erred by admitting it. Appellant did not at trial and does not now dispute the cell phone belonged to him. He did not and does not dispute that the photograph was found on his cell phone. Rather, appellant's contention is that no evidence established the gun in the photograph was the gun used in the commission of the crimes, and no evidence was presented regarding when the photograph was taken. We note appellant cites no authority in support of his argument either in his opening or reply briefs. Nevertheless, appellant's claim fails.

We review a court's decision to admit evidence for abuse of discretion. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.) Before a photograph is admitted into evidence, it must be authenticated. (Evid. Code, §§ 250, 1401.) "As with other writings, the proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error. [Citation.] The first step is to determine the purpose for which the evidence is being offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.] The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.] Essentially, what is necessary is a prima facie case. 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' " (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266–267.)

"A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location." (*People v. Goldsmith*, *supra*, 59 Cal.4th at pp. 267–268.)

Here, Corporal Williams testified the photograph was a true and accurate copy of a photograph she viewed on appellant's cell phone, which had been seized from appellant and booked into evidence the day after the incident. This was sufficient to establish authenticity. That is, it established the photograph was a fair and accurate representation of what it purported to be, a photograph found on appellant's cell phone. Implicit in appellant's argument, however, is a challenge to the photograph's relevance.

The Court of Appeal in *People v. Rinegold* (1970) 13 Cal.App.3d 711, 720–721 (*Rinegold*), discussed the relevance and admissibility of evidence that a defendant at one time possessed a weapon in a case involving a crime committed with a weapon:

> "Where the prosecution's evidence is circumstantial, an implement by means of which it is likely that a crime was committed is admissible in evidence if it has been connected with the defendant [citations]. *If the specific type of weapon used to commit a homicide is not known[,] any weapons found in the defendant's possession after the crime that could have been employed are admissible.* ***There need [not] be [any] conclusive demonstration that the weapon in defendant's possession was the murder weapon.*** But if the prosecution ***relies*** on a ***specific*** weapon or type, it is error to admit evidence that other weapons were found in the defendant's possession, as this tends to show not that he committed the crime but only that he is the sort of person who carries deadly weapons (*People v. Riser* [(1956)] 47 Cal.2d 566, 576–577 [overruled on other grounds by *People v. Morse* (1967) 60 Cal.2d 631]; [citations]). [¶] The distinctions set forth in [*Riser*] are not exclusively applicable to homicide cases [citation] and provide a useful guide for the instant case where we are not concerned directly with the admission of the weapon but testimony that the day before the assault, [the] defendant was seen with a revolver. [T]he law is established in California that when a defendant denies that he possessed an instrumentality, such as a firearm, as distinguished from a specific type of gun, alleged to have been used in the commission of an offense, evidence is admissible to show that such an instrumentality was in fact possessed by the defendant at other times [citation.] This is true whether the possession of the instrumentality by defendant is shown to have been prior or subsequent to the offense upon which he is being tried [citation]." (*Rinegold, supra,* 13 Cal.App.3d at pp. 720–721, boldfaced italics added.)

The *Rinegold* court concluded, "testimony that [the] defendant had a revolver the day before the assault ... would tend to connect [the] defendant with the crime" and was relevant on that basis. (*Rinegold, supra,* 13 Cal.App.3d at p. 721.)

More recently, in *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052, the California Supreme Court held it was proper for a witness to testify that a murder defendant told her he kept a gun in his van and another witness to testify that the defendant showed her a gun that "look[ed] like" the murder weapon. "Although the

witnesses did not establish the gun necessarily was the murder weapon, it might have been.... The evidence was thus relevant and admissible as circumstantial evidence that he committed the charged offenses." (*Ibid.*)

Here, the firearm depicted in People's exhibit 10 was with the Kingdom Recordings cassette box, a unique possession of appellant's; this tends to prove appellant was at one time in possession of the firearm. Jose testified the firearm appellant used was an "automatic" pistol and the firearm depicted in People's exhibit 10 was an "automatic pistol" "similar" to the one appellant used in the commission of the crimes. The firearm in the photograph was of the same type purportedly used in the commission of the crimes. Thus, the evidence is relevant and admissible as circumstantial evidence tending to connect appellant with the crimes. Appellant's argument that the firearm in the photograph was not necessarily the firearm used in the crimes goes to the weight of the evidence. The final determination as to the weight of the evidence is for the jury to make. (*People v. Brown*, *supra*, 59 Cal.4th at p. 106.) The court did not err by admitting the photograph of the firearm.

III. Section 654

Section 654, subdivision (a) reads in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "[T]he section's proscription extends to include both concurrent and consecutive sentences …." (*In re Adams* (1975) 14 Cal.3d 629, 636.) "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction.... If all the offenses were *incident to one objective,* the defendant may be punished for any *one* of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551, italics added.) " 'The defendant's intent and objective are factual questions for the trial court;

[to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced.' " (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.)

Generally, when a defendant is convicted of burglary and the intended felony underlying the burglary, section 654 prohibits punishment for both crimes. (*People v. Islas*, *supra*, 210 Cal.App.4th at p. 130.) However, "[i]f [a] defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The application of section 654 thus "turns on the *defendant's* objective in violating" multiple statutory provisions. (*People v. Britt* (2004) 32 Cal.4th 944, 952.) Where the commission of one offense is merely " 'a means toward the objective of the commission of the other,' " section 654 prohibits separate punishments for the two offenses. (*People v. Britt*, at p. 953.)

Appellant argues the punishment for the burglary conviction must be stayed pursuant to section 654 because the court was not required to sentence appellant to both the burglary and the robbery, citing *People v. Miller* (1977) 18 Cal.3d 873 (*Miller*). In *Miller*, the California Supreme Court mentioned that though section 654 prohibits multiple punishments for an "indivisible course of conduct," there is an exception where crimes of violence against multiple victims are involved. (*Miller, supra*, 18 Cal.3d at p. 885.) In *Miller*, the court determined that the burglary in that case was a crime of violence and thus upheld the proscription of multiple punishments for both a burglary and a robbery. *Miller* is not apposite because the trial court did not rely on the multiple victim exception to section 654 in sentencing appellant on both the burglary and the robbery. Rather, the court found appellant had separate criminal objectives in committing the burglary and the robbery. The trial court found:

> "[T]he defendant appeared to have separate criminal objectives. [¶] The evidence presented at trial suggested that [appellant] entered the home for the purposes of committing an assault and a 422 on the occupants. This is indicated by the fact that he arrived earlier and spoke with the female victim first and learned that her new boyfriend was inside. [¶] When he returned knowing that they were inside together, he entered the bedroom with two weapons, one in each hand, and proceeded to threaten them using the weapons. [¶] There was no indication at that time that he intended to take anything by force or fear. [¶] It wasn't until the assault and 422s were interrupted by the arrival of the children and their demand that he leave that he formed—appeared to form the intent to take property from the victim's [*sic*] as he exited. [¶] This, to this Court, indicates—the second taking of property indicates a separate criminal objective that was independent of the first original intent and objective."

We apply a substantial evidence standard of review. "The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438; see *People v. Osband*, *supra*, 13 Cal.4th at p. 730 [approving substantial evidence standard of review as stated in *Saffle*].) "[T]he law gives the trial court broad latitude in making this determination." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Here, the trial court's finding is supported by substantial evidence. The testimony suggests that appellant's primary objective was to assault Cecilia and Jose. Jose testified appellant had been talking for eight or nine minutes before asking for both his and Cecilia's cell phones and stayed for another five to 10 minutes after he took the cell phones. Because substantial evidence supports a finding that appellant had a different objective in committing the burglary than in committing the robbery, section 654 did not require the trial court to stay the sentence on the burglary count.

IV. Sufficiency of the Evidence

On a challenge to the sufficiency of the evidence, our role is limited. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial

evidence—that is, evidence which is reasonable, credible, and of solid value…." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We presume the existence of every fact the trier of fact could reasonably deduce from the evidence that supports the judgment. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) We do not reweigh the evidence or revisit credibility issues. (*People v. Icke* (2017) 9 Cal.App.5th 138, 147.) We apply the same standard of review on a challenge to the sufficiency of the evidence of an enhancement as to the sufficiency of the evidence of a conviction. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057–1058.) Appellant contends the evidence is insufficient to support his enhancements and convictions in counts 1, 2, 3, 5, and 6.

A. Enhancements

Appellant argues the evidence is insufficient to prove he used a deadly weapon or a firearm in the commission of the crimes. Specifically, he claims "the People did not provide any exhibits regarding the knife" and "[t]here is no specific information as to the qualities of the knife." Similarly, as to the firearm, appellant states that no gun was found and although a picture of a handgun was found on appellant's cell phone and presented to the jury, there is no direct evidence establishing the gun in the picture was the gun used in the commission of the crimes.

Appellant fails to acknowledge the testimony of the victims establishes that appellant used both a knife and a firearm in the commission of the crimes. "[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.' " (*People v. Mejia* (2007) 155 Cal.App.4th 86, 93.) Our role is not to determine credibility of witnesses. " '[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 996.)

Both Cecilia and Jose testified appellant used both a knife and a gun in the commission of the crimes. As to the knife, Cecilia testified the length of the knife

including the handle was approximately nine inches and the length of the blade was six inches. The blade of the knife had ridges and curved up at the end slightly. Jose also testified the full length of the knife was approximately nine to 10 inches and that the blade had a curve. Cecilia testified she had "stick marks" from where appellant held the knife directly to the center of her chest. As to the gun, Cecilia testified appellant was pointing a black gun at Jose. Jose testified the gun was an "automatic" as opposed to a revolver and that the gun depicted in People's exhibit 10 was similar to the gun appellant used during the commission of the crimes.

Though the weapons used were not recovered nor produced, the jury could have found both witnesses credible regarding the weapons. The enhancements are supported by sufficient evidence.

B. Count 1: Robbery

Robbery is the taking of personal property from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property. (§ 211.)

Appellant contends the evidence is insufficient to support his robbery conviction because there was no evidence appellant was holding the firearm to Jose when he obtained his cell phone, and Jose stated he did not feel fear and was just observing appellant. We conclude there is sufficient evidence that Jose's property was taken by fear. Jose testified appellant entered the room with a firearm and a knife and asked for his and Cecilia's cell phones after he had been there for eight or nine minutes and five to 10 minutes before he left. Appellant put away his gun and knife when Cecilia's son arrived and left immediately thereafter. This timeline suggests appellant was holding the gun to Jose when he obtained the cell phone. Though at one point during his testimony, Jose stated he was not afraid at a particular moment, he later testified he was afraid appellant would hurt him. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts." (*People v. Young* (2005) 34

Cal.4th 1149, 1181.) Rather, "[r]esolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*Ibid.*) Jose also testified he was in fear for Cecilia. The fear required for a robbery conviction may be the fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery. (§ 212.) Further, Jose testified he did in fact turn his cell phone over to appellant. It is unlikely Jose would have turned over such a valuable item without protest if he was not in fear. Appellant's robbery conviction is supported by sufficient evidence.

C. Count 2: Burglary

Elements of first degree burglary under section 459 are (1) entry into a structure currently being used for dwelling purposes (2) with the intent to commit a theft or a felony. (*People v. Sample* (2011) 200 Cal.App.4th 1253, 1261.) Since burglary is a breach of the occupant's possessory rights, a person who enters a structure enumerated in section 459 with the intent to commit a felony is guilty of burglary *except* when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent. (*People v. Salemme* (1992) 2 Cal.App.4th 775, 781.)

Appellant contends that the evidence is insufficient to support his burglary conviction because he did not enter Cecilia's apartment "unlawfully" in that he had keys to her apartment. Appellant contends this signifies he "may" have had an "unconditional right to enter." Appellant also argues he did not enter the apartment with felonious intent and merely "wanted to talk."

" 'The possessory right protected by section 459 is the "right to exert control over property to the exclusion of others" or, stated differently, the "right to enter as the occupant of that structure." ' " (*People v. Smith* (2006) 142 Cal.App.4th 923, 932.) Though appellant had keys to Cecilia's apartment, there is no indication he had a right to exert control over the apartment to the exclusion of others nor that he had an

"unconditional right to enter." The record supports the contrary inference, as appellant knocked insistently for several minutes the first time he went to the apartment on the day of the incident.

As for appellant's intent at the time he entered the apartment, appellant essentially asks us to consider his version of events and skew all inferences in his favor. We must not reweigh the evidence and must make every inference in favor of the judgment. Appellant entered the apartment with a knife and a firearm and proceeded to commit an assault on and threaten Cecilia and Jose. Cecilia testified she did not see any weapons on appellant when he went to her apartment the first time on the day of the incident. The jury could have reasonably concluded that because appellant brought weapons with him when he went into the apartment the second time, he had formed the intent to commit the subsequent felonies before he entered the apartment.

Even if we were to accept appellant's inference from the evidence that he entered the apartment the second time with the intent to talk to Cecilia, our decision would not be altered. Section 459 specifies that burglary applies to every person who enters any "house, *room*, apartment, tenement, shop…." Our high court has concluded that an entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction even if that intent was formed after the defendant's entry into the house. (*People v. Sparks* (2002) 28 Cal.4th 71, 73.) The evidence shows appellant entered the room with the gun and the knife already in hand. Clearly, he had formed the intent by the time he entered the bedroom. Appellant's burglary conviction is supported by sufficient evidence.

D. Count 3: Assault with a Firearm

Appellant contends the evidence is insufficient to support his conviction for assault with a firearm because the prosecutor did not meet its burden in proving the firearm was loaded; that is, appellant had the present ability to apply force. Appellant correctly points out that without proof the firearm was loaded or the firearm was being

used as a club or bludgeon, the People cannot prove that a defendant had the present ability to apply force. (See *People v. Orr* (1974) 43 Cal.App.3d 666, 672.)

What appellant does not acknowledge is whether a loaded gun can be proven by circumstantial evidence. "A defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a loaded weapon." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 13 (*Rodriguez*).) In *Rodriguez*, the Court of Appeal had reversed the defendant's assault conviction due to what it viewed as the absence of evidence the gun was loaded or that the defendant had attempted to use it as a club or bludgeon. (*Id*. at pp. 10–11.) The California Supreme Court granted review and admonished the Court of Appeal for appearing not to follow the deferential substantial evidence standard. (*Id*. at pp. 11–12.) In *Rodriguez*, the facts supported an inference that the gun was loaded. The defendant in *Rodriguez* was a gang member and would not logically carry an unloaded gun in an area where gang violence was prevalent. While pointing a gun to a victim's chin, the defendant said, " 'I could do to you what I did to them,' " possibly referring to a previous homicide. (*Id*. at p. 12.) Here, both witnesses testified appellant was pointing a gun at Jose while making violent threats regarding castrating him and cocked the firearm. The gesture of cocking the firearm is illogical if the gun is not loaded. The jury could reasonably infer from these facts that the gun was loaded.

Appellant argues *Rodriguez* is distinguishable because, in the present case, the prosecutor's misstatement of the law and "deceptive conduct," presumably referring to the graphic discussed in Part A of this opinion, "prejudicially swayed the jury." As we discussed above, we find no prejudice. Viewing the evidence in the light most favorable to the judgment, appellant's assault with a firearm conviction is supported by sufficient evidence.

E. Counts 5 and 6: Criminal Threats

The elements of making criminal threats under section 422 are: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement ... is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, ... so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228.) "[A]ll of the circumstances can and should be considered in determining" whether the defendant made a criminal threat in violation of section 422. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1014.)

Appellant contends the evidence is insufficient to support his criminal threats conviction against Cecilia because appellant's words directed at her, that he should have killed her when she was 14, did not constitute a threat because it was in the past tense. The heading of this section in appellant's brief is "Count V and VI," but appellant makes no argument in regard to the threat to castrate Jose. Appellant also makes no argument concerning whether appellant's threat to castrate Jose was also a threat to Cecilia.

Here, the prosecutor's theory was that Cecilia was a victim of appellant's threat to castrate Jose because Jose was an "immediate family" member of Cecilia's. "Immediate family" is defined by section 422, subdivision (b) as "any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the

prior six months, regularly resided in the household." Jose testified that he lived in Morgan Hill and stayed with Cecilia on the weekend the majority of the time. During the week, Cecilia would stay with Jose in Morgan Hill. Whether this pattern constitutes "regularly resides in the household" is a factual question for the jury. The jury was properly instructed on the definition of immediate family. Appellant's conviction of criminal threats against Cecilia is supported by sufficient evidence.

V. Senate Bill 620

At oral argument, this court requested supplemental briefing on whether the matter should be remanded to allow the trial court to exercise its new discretion to strike the firearm enhancements under sections 12022.5, subdivision (c) and 12022.53, subdivision (h).

Section 12022.5, subdivision (a) provides that anyone who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or 10 years. Section 12022.53, subdivision (b) provides that anyone who personally uses a firearm in the commission of an enumerated felony, of which robbery is one, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. Until the enaction of Senate Bill 620, the imposition of these enhancements was mandatory. Senate Bill 620 was signed by the Governor on October 11, 2017, and became effective January 1, 2018. It amended sections 12022.5 and 12022.53 to include the following provision:

> "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by [either section]. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

The parties agree that Senate Bill 620 applies retroactively to appellant's case. They disagree, however, as to whether remand is necessary to allow the trial court to

exercise its new discretion under the amendments. Appellant argues the matter should be remanded because appellant's prior criminal history only included vehicle code violations and did not include any aggravated felonies, crimes of violence, or crimes involving moral turpitude. Respondent argues remand is unnecessary because the trial court indicated by its statements and sentencing choices that it would not have struck the firearm enhancements. We agree with respondent that remand is unnecessary.

"[I]f ' "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." ' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, the trial court considered appellant's minimal criminal history by choosing to run the sentence for count 2 concurrent to count 1. The trial court told appellant's trial counsel that it agreed with her assessment that the situation seemed to be situational but added "the bottom line is that [appellant] used two weapons, and it was a very violent incident." The trial court then stated, "I think 15 years is the appropriate sentence in this case." We note the trial court chose the aggravated term of 10 years for the section 12022.5, subdivision (a) enhancement connected to count 2. The trial court was careful and deliberate in fashioning the overall total sentence. Thus, we conclude remand would be an idle act.

DISPOSITION

The judgment is affirmed.

_____
DE SANTOS, J.

WE CONCUR:

_____
DETJEN, Acting P.J.

_____
SNAUFFER, J.